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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1085

JOSEPH A. RICH,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
a Railroad Corporation,

Respondent.

Petition For A Writ of Certiorari To The Supreme Court of Florida

LAWRENCE V. HASTINGS
IRMA ROBBINS FEDER
312 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Attorneys for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No.

JOSEPH A. RICH,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, a Railroad Corporation,

Respondent.

Petition For A Writ of Certiorari To The Supreme Court of Florida

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida, entered in the above entitled case on November 23, 1966.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported in 183 So.2d 692 and

appended hereto *infra* at A* 3. The opinion of the Supreme Court of Florida is reported in 192 So.2d 2 and appended hereto *infra* at A 6.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on November 23, 1966 (T 543, A 6). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3) since petitioner claims denial of his rights under the Federal Employers' Liability Act, 45 U.S.C. Secs. 51 et. seq. (hereinafter called the FELA).

QUESTIONS PRESENTED

(1) Did the court below deny petitioner-railroad-employee's rights under the FELA by holding as a matter of law that respondent-railroad was not liable for any negligence committed by "its doctors" since (a) said doctors were not employees of the railroad, (b) the railroad had no actual or imputed knowledge of their unfitness, and (c) all other evidence of "agency", ie, petitioner's proof that said doctors were the railroad's agents under the so-called operational-activity-of-the-carrier and financial-benefit-to-the-carrier special FELA tests, was legally irrelevant?

(2) Was not petitioner entitled to a directed verdict on liability under the FELA as the evidence conclusively established that respondent's negligence played some part in producing the injuries?

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* "A." refers to pages of the Appendix and "T." to pages of the certified transcript. Emphasis in quoted material is added by counsel.

(3) Was not the jury verdict for respondent contrary to the manifest weight of the evidence presented in this FELA action?

(4) Was not petitioner entitled to have the jury charged on the Sudden Peril Doctrine in view of its applicability in this FELA action?

STATUTE INVOLVED

The statutory provisions involved are Sec. 1 of the Federal Employers Liability Act, 35 Stat. 65, as amended 53 Stat. 1404, 45 U.S.C.A. Sec. 51, setting forth the scope of railroad's liability, and Sec. 3 of the FELA, 35 Stat. 66, 45 U.S.C.A Sec. 53, dealing with contributory negligence and dimunition of damages. Both sections are printed in the Appendix (A 1).

STATEMENT

PROCEEDINGS BELOW

Petitioner's complaint, filed in the Circuit Court for the Eleventh Judicial Circuit of Florida on February 5, 1964, asserted his FELA claim that his injuries, received when he fell from a train to the right-of-way on August 17, 1961, were caused by the railroad's negligence in failing to furnish a reasonably safe place to work and reasonably safe equipment or by its negligent management, operation, etc. of its system (T 21). An amendment to the complaint, paragraph 5(e), alleged as additional negligence that Dr. Center and/or Dr. Fox, as agents of the railroad, negligently gave petitioner medication for a rash and negligently failed to warn of its mental and physical

side effects although they knew of his hazardous railroad work (T 27-29):

> " . . . that unknown to the plaintiff but well known to said doctors, the said medication caused the plaintiff to be *unsteady, on his feet, caused impairment of his coordination, and balance and also caused mental confusion, and impairment of mental acuity and other mental impairment;* all of which caused, or contributed to the cause of plaintiff's injuries . . . "

The railroad's answers denied negligence and alleged contributory negligence (T 25).

The railroad's motion to dismiss the complaint was denied (T 23-24), as was its motion for summary judgment (T 32-38).

After a three days jury trial (T 111 et. seq.), the court entered a partial directed verdict striking the amendment to the complaint on the ground that the railroad was not responsible for the acts of Dr. Center and Dr. Fox as a matter of law (T 436-437, see 428-436), instructed the jury that the doctors "were *not* agents of the railroad when treating the plaintiff . . . prior to the accident" (T 455), and submitted the case to the jury solely on the negligence allegations (and supporting evidence) in the original complaint.

The jury found the railroad "not guilty" (T 509, 104), final judgment was entered for the railroad (T 487), and petitioner's motion for new trial was denied (T 105-107).

Petitioner appealed to the District Court of Appeal, Third District of Florida, which affirmed the judgment below (T 11, A 3) and certified the case to the Supreme Court of Florida on the ground that its decision " 'passes upon a question of great public interest' in that the decision concerns the rights of employees suing under the FELA" (T 10).

The Supreme Court of Florida granted certiorari (T 54) and "approved and affirmed" the decision of the appellate court in a per curiam opinion filed in November 23, 1966 (T 543, A 6).

SUMMARY OF EVIDENCE

The evidence presented to the jury established the railroad's negligence not only with reference to the specific circumstances of the accident on August 17, 1961, but also with reference to the medication given petitioner starting three days before the accident by doctors for whose negligence the railroad should be liable.

Petitioner, a railroad employee from age 22 until his present age of 34 (T 129), was working for the railroad on August 14, 1961, in connection with a bridge repair job when he broke out with a rash around noon (T 130-134, 190). He was taken back to the depot where the railroad's "agent . . . in charge" sent him to Dr. Center; "a company employee drove him to Dr. Center, whom he had never before seen (T 134-135). Dr. Center treated the rash (without diagnosing its cause, T 202, 206) with an injection and Pyrabenzamine tablets to be taken two or three times a day (T 201-203) and returned petitioner to work within a half hour (T 334-335). Dr. Center testi-

fied that he is the railroad's doctor for the Clearwater area (T 201) and that he referred petitioner to another railroad doctor, "the Coast Line doctor in St. Petersburg, which is Dr. Fox", if further treatment was needed (T 203-204). Dr. Center never determined whether or not the rash was work-connected or the visit "a railroad case", but accepted petitioner's $3.00 or $4.00 check and avoided the railroad's "umpteen forms" (T 202, 205, 206, 179). He never saw petitioner before or after this visit although his prescription was sent to petitioner and hand-delivered to him by a railroad employee on the job the next day (T 136-138).

The rash did not go away. On August 16 petitioner "marked off sick" (T 140) and went to see Dr. Fox, who testified that he is one of the railroad's doctors for the St. Petersburg area (T 207-208), that he approved and continued Dr. Center's medication, and that he advised petitioner to return to work (T 207-210). Although Dr. Fox deemed petitioner's visit a "private" one and was paid by petitioner (T 295), he rendered a report concerning it to the railroad (T 301).

Dr. Fox testified that he saw petitioner at various times as a railroad doctor or as his private family physician (T 208-209, 213-214, 127). As a railroad doctor he gave petitioner annual physical examinations prior to the accident (T 208-209), saw petitioner unofficially during his hospitalization (under the care of orthopaedic surgeons to whom Dr. Fox had referred petitioner following the accident), and saw petitioner after his hospital discharge as part of his "job" to check on the railroad's injured employees and "form a liason" with the railroad's chief surgeon (T 211). Dr. Fox gave petitioner his required

railroad physical examinations in 1962 and 1963 (after the accident, both of which he passed), the chief surgeon having issued his initial return-to-work certificate as required when severe injuries occur (T 212-214).

The railroad's answers to interrogatories 28 and 29 state that "Dr. Center, Clearwater" and "Dr. Fox, St. Petersburg" were "designated by the defendant-railroad on its list of approved or appointed physicians and surgeons" and granted "pass privileges on the defendant railroad" (T 218).

Dr. Holmes testified as an expert witness that Pyrabenzamine is an antihistamine having chemical side-effects including "things like sleepiness, *dizziness*, drowsiness, slurred speech and *slow thinking*" (T 273).

On August 14, 15 and 17, 1961, petitioner's job was to bring a work crane (with equipment) from a pass track switch half a mile or so north to a bridge (being repaired by a separate crew) and to return the work crane at the end of the day (T 133-134). The accident took place in the late afternoon of August 17th, after petitioner had returned the work crane, when he attempted to carry out the bridge foreman's order "to tell the engineer of Work Extra 211 (a train stopped on the main line next to the pass track, T 211) that he was to approach the bridge cautiously and prepared to stop "as the rails were jacked up" (T 146-148); there was water flowing under the bridge (T 143). Petitioner was on the way up to the engine cab, was interrupted by Flagman Motes, and then stepped down (T 147-149). The engine proceeded to go ahead and petitioner was unsuccessful in waving it down with a standard stop signal and then

a washout-stop-immediately stop signal as the over-700-foot-train passed (T 149-150, 319). Seeing no one on the caboose, petitioner tried to board the train to put the air on and stop it from the back, but he was unsuccessful and fell off (T 150-152), receiving a 10%-25% permanent disability of his leg *inter alia* (T 246, 278-279, 271-272).

Petitioner testified that he did not know exactly what caused him to miss the train (T 173) but that the effects of the medication were the general cause as he "*wasn't functioning properly . . . [and] was lightheaded*" (T 181).

Petitioner's immediate supervisor or conductor on August 14, 15 and 17 was Bugner. Bugner knew of petitioner's rash, his visit to Dr. Center, his taking of the pyrabenzamine pills, and his reaction of *severe unsteadiness, dizziness, lack of coordination*, etc. (T 334-335, 338-340, 138-142). Bugner required or permitted petitioner to continue working in spite of his reaction although the railroad's Rule 882 states that a conductor must not permit unfit workers to work (T 523, 340, 362). Bugner had no medical training or special courses in determining fitness for duty (T 338-339).

Playford, the third member of petitioner's crew on August 14, and 15, *was also aware of petitioner's reaction to the pills* (T 189-191). Playford was not allowed to start his vacation until one day late due to the shortage of men on the 15th (T 191, see also 361, 341-342).

The bridge foreman's oral order to petitioner and Bugner to warn Work Extra 211 about the bridge violated the railroad's Rule 120 which requires that "[m]essages

or orders respecting the movement of trains or the condition of tracks or bridges must be in writing" (T 528).

Neither the engineer, fireman, brakeman or flagman in Work Extra 211's engine cab saw petitioner's stop signals although there were windows on the front, both sides, and back, all the way around (T 331, 332, 180-181, 360) and the railroad's Rule 111 requires train and engine crews to be on the alert to receive signals from ground crew who must watch passing trains for defects, etc., and give appropriate "stop" or "proceed" signals (T 521, 162-163, 193-194, 330-331, 379; see also Rules 12G, 84, 12H, 108, 106, and 883, T 515-520, 523). Not one of the Work Extra 211 crew members was in his normal proper position at the time of the accident (T 373, 378, 387, 348-350, 358-359, 364-366, 406, 161-162 and Rules 925, 926 and 932, T 525-527).

After unsuccessfully trying to wave Work Extra 211 down and falling off when he tried to board the end of the train, petitioner got up and tried to run after the train but his legs gave out and he fell down again; petitioner was "shouting and hollering and whatnot to stop", which the train finally did (T 151-152, 406-407).

FEDERAL QUESTIONS RAISED

Petitioner contended unsuccessfully that his rights under the FELA were denied, with respect to each of the four "Questions Presented" herein, at all appropriate times in the courts below.

(Question 1.) Petitioner objected to the trial court's entry of a partial directed verdict for the railroad (taking

the issue of the doctors' agency and negligence away from the jury), objected to the charge so informing the jury (T 428, 436-437, 455), raised this point in the motion for new trial (Nos. 6 and 7, T 105-107), the appeal to the Florida District Court of Appeal (Ass. of Error Nos. 6 and 7, T 511c), and certiorari proceedings in the Florida Supreme Court (Petition for Certiorari, Par. 8[1], T 2, 6-7).

(Question 2.) Petitioner moved for a directed verdict on liability at the close of all the evidence on the ground that the evidence conclusively established the railroad's negligence "proximately contributing, at least, in part" to his injuries (T 440-441). This point was raised again in the motion for new trial (No. 5, T 105-107), as well as in the Florida District Court of Appeal (Ass. of Error No. 5, T 511c) and Florida Supreme Court (Petition for Certiorari, par. 8[2], T 2, 7-8).

(Question 3.) Petitioner contended that the jury verdict for the railroad is contrary to the manifest weight of the evidence under FELA law in the motion for new trial (No. 4, T 105-107) as well as in the Florida District Court of Appeal (Ass. of Error No. 4, T 511c) and Florida Supreme Court (Petition for Certiorari, par. 8[3], T 8).

(Question 4.) Petitioner's Requested Charge No. 14 on the Sudden Peril Doctrine was denied by the trial court, over petitioner's objection in view of its clear applicability in the instant FELA case with reference to the question of contributory negligence (T 99, 448-449, 454, 400). Petitioner again raised this point in the motion for new trial (No. 9, T 105-107) as well as in the Florida District Court

of Appeal (Ass. of Error No. 9, T 511c) and Florida Supreme Court (Petition for Certiorari, par. 8[4], T 2, 8-9).

The Florida District Court of Appeal and Florida Supreme Court explicitly noted, in their opinions affirming judgment for defendant, that *all* questions presented by petitioner were considered before affirming judgment for the railroad (T 11, 544, A 3, 7) although both opinions discussed in detail only the first question (concerning the doctors' "agency" and the railroad's liability for their negligence).

REASONS FOR GRANTING THE WRIT

1.) (Question 1.) The decision below, restricting a railroad's FELA liability for "negligence of its doctors in treatment of an employee" to cases where the doctor is the railroad's employee or else the railroad has actual or constructive knowledge of the doctor's unfitness (T 543-544, A 6, 7), conflicts with the operational-activity-of-the-carrier test for FELA agency, as set forth by this Court in *Sinkler v. Missouri Pacific R. Co.*, 356 US 326, and *Hopson v. Texaco*, 383 US 262.

Under the FELA whether *anyone* is an agent of a railroad (for whose negligence the railroad is therefore liable) is normally a jury question to be decided on the basis of all relevant evidence in the case. *Baker v. Texas & Pacific Ry. Co.*, 359 US 227, 228, *Ward v. Atlantic Coast Line R. Co.*, 362 US 396, 398-400. Moreover, an accommodating scope "must be given to the word 'agents' " under the FELA (and under the the Jones Act) in order to effectuate the humanitarian purpose of the legislation, namely, protection of railroad workers (and seamen)

whose extraordinarily hazardous occupations bring tremendous benefit to their employers as well as the general public. *Sinkler v. Missouri Pacific R. Co.*, 356 US 326, 329-331, and *Hopson v. Texaco*, 383 US 262, 263-264.

The evidence concerning the role of Dr. Center and Dr. Fox as agents of respondent-railroad for FELA purposes is summarized in the Statement, *infra*. Both Dr. Center and Dr. Fox performed their "duty" as respondent-railroad's agents by attempting to keep plaintiff on the job as much as possible in spite of his rash (and note that the railroad was short-handed at the relevant time). At least, said doctors performed said duty until petitioner sustained severe injuries in the accident which occurred while he was under the influence of said doctors' prescribed medication! It seems clear that Dr. Center and Dr. Fox were engaged in nondelegable-operational-activity of the railroad when treating petitioner *and* returning him to work, for the bridge could not be repaired without the crane.

If another test for FELA agency be direct-financial-benefit-to-the-carrier (as has been held by a California lower court, State District Court of Appeal, in *Mangrum v. Union Pacific R. Co.*, 230 Cal. App.2d 860, 41 Cal. Reptr. 536, and *McGuigan v. Southern Pacific Co.*, 129 Cal. App. 2d 482, 277 P.2d 444), then Dr. Center and Dr. Fox qualify under this test also: their services were of direct financial benefit to the railroad since it was required by custom and practice to take care of employee who got sick while on duty—and the railroad's rules require that only employees *fit* for duty shall work.

In the case at bar the Florida Supreme Court (as well

as the Florida District Court of Appeals) found it totally unnecessary to discuss or even cite any of this Court's decisions upon which petitioner relied (and relies herein). Instead, the Florida Supreme Court relied exclusively on the old rule as stated in 1893 in *South Florida R. Co. v. Price*, 32 Fla. 46, 13 So. 638, and in 1911 in *Atlantic Coast Line R. Co. v. Whitney*, 62 Fla. 124, 56 So. 937. Indeed, not only recent FELA agency law but also the Florida Supreme Court's 1942 *dicta* in *City of Miami v. Oates*, 152 Fla. 21, 10 So. 2d 721, 724, (impliedly rejecting the old Whitney/Price ruling) was completely ignored in the Florida Supreme Court's opinion.

Petitioner submits that general agency common-law rules enunciated by the Florida Supreme Court, insulating a railroad from liability for its doctors' negligence in view of their alleged status as "independent contractors", are inapplicable in FELA cases. *Sinkler v. Missouri Pacific R. Co.*, 356 US 326, 329-331.[1] Limiting the railroad's FELA liability to instances in which the doctor is an "employee" or the railroad has knowledge of the doctor's incompetence runs counter to this Court's decisions noted previously.

Such limitation also deprives the employee, such as petitioner, of his right to jury trial on the issue of the doctor's "agency" and the railroad's liability for the doctor's negligence. See e.g. *Wilkerson v. McCarthy*, 336 US 53, 55 and *Rogers v. Missouri Pacific R. Co.*, 352 US 500, 510, (Petitioner attacked the partial directed verdict for the railroad in the courts below on the ground that

[1]Although "normal agency rules" are not controlling in an FELA case, it should be noted that there was evidence of the railroad's selection and control of the doctors involved in the case at bar. See Statement, Summary of Evidence, *supra*.

the status of Dr. Center and/or Fox as "agents" of the railroad for purposes of FELA liability was proven as a matter of law[2] or, in the alternative, presented a jury question [see T 2, 6-7]; petitioner reiterates its alternative position herein).

The importance of the quesiton presented, ie, whether railroads and shipowners can avoid liability to employees for negligence committed by company doctors because the doctors are not actual employees or knowledge of the doctors' unfitness is lacking, is as great as the number of railroad workers and seamen affected by the FELA and Jones Act.

2.) (Question 2.) Thedecision below affirming the denial of a directed liability verdict for petitioner conflicts with the principle set forth in this Court's decisions to the effect that a railroad is liable under the FELA if its "negligence played *any* part, even the slightest, in producing the injury * * * for which damages are sought" and that such liability exists in spite of "other causes, including the employees' contributory negligence". *Rogers v. Missouri Pacific R. Co.*, 352 US 500, 506-507; also *Webb v. Illinois Central R. Co.*, 352 US 512. (See also *Eglsaer v. Scandrett*, 7th Cir., 151 F.2d 562; *O'Day v. Chicago River & Indiana R. Co.*, 7th Cir., 216 F.2d 79; *Chicago Great Western Ry. Co. v. Scovel*, 8th Cir., 232 F.2d 952, 957, cert. den. 352 US 835; *Cromling v. Pittsburgh & Lake Erie R. Co.*, 3rd Cir., 327 F.2d 142).

Cases not decided by this Court have held that the issue of the railroad's FELA liability should not be de-

[2]Petitioner relied below on *Mangrum v. Union Pacific R. Co.*, 230 Cal. App.2d 860, 41 Cal. Rptr. 536, 548, and *McGuigan v. Southern Pacific Co.*, 129 Cal. App.2d 482, 277 P.2d 444, 454.

termined by the jury and liability verdicts should be directed for the employee when proof of negligence causing the injury meets the relatively light FELA requirements. *Moore v. Atchison, Topeka & Santa Fe R. Co.*, 28 Ill. App.2d 340, 171 N.E.2d 393, *Williamson v. Wabash R. Co.*, 355 Mo. 248, 196 S.W.2d 129, cert. den. 330 US 824.

Petitioner submits that the evidence presented in the case at bar conclusively established that the railroad's negligence played some part in producing his injuries (thus entitling him to a directed verdict on liability), in that (a) Dr. Center and/or Dr. Fox, as agents of the railroad, prescribed pyrabenzamine without warning petitioner or the railroad of the medication's known side effects and without telling either that petitioner was unfit to return to work involving trains and other heavy machinery, (b) petitioner's supervisor, Bugner, required and permitted him to work while he was sick and Bugner knew he was sick and unfit for work around heavy machinery, (c) the bridge foreman's *oral* order to petitioner (and Bugner) to orally warn Work Extra 211 of the jacked-up bridge violated the railroad's rules and represented a total lack of reasonable care under the circumstances, and/or (d) petitioner's fellow employees on Work Extra 211 were clearly negligent (and violated the railroad's rules) in neither looking for nor seeing petitioner's regular and emergency stop signals.

The issue of contributory negligence, if any, cannot prevent a directed verdict in an employee's behalf, as contributory negligence merely reduces damages proportionately in an FELA action under 45 USCA Sec. 53. Had petitioner in the case at bar been given the directed verdict on liability to which he was entitled, with appropriate

damage charges (including the effect of contributory negligence), then the verdict absolving the railroad from *all* liability would have been impossible.

The effect of the Florida Supreme Courts' decision herein is to deny rights granted by the FELA, 45 USCA, Secs. 51 and 53.

3.) (Question 3.) The decision of the court below to the effect that the verdict for the railroad was not contrary to the manifest weight of the evidence conflicts with the same principle and cases discussed under Sec. 2 of the Reasons for Granting the Writ, *supra*, in that evidence not conclusive enough to require a directed verdict for a plaintiff can be sufficient to render a verdict for a defendant contrary to its manifest weight.

Petitioner contends that the evidence presented did not permit a finding that his negligence, if any, was the *sole* cause of his injuries, nor a finding that the railroad committed *no* negligence which played a slight part in producing his injuries. See *King v. Union Pacific R. Co.*, Utah, 212 P.2d 692, 694-695.

4.) (Question 4.) The decision of the court below affirming the denial of petitioner's requested charge to the jury on the Sudden Peril Doctrine conflicts with numerous lower court cases, including *Sandri v. Byram*, 6th Cir., 30 F. 784, 786-787; *Chesapeake & O. Ry. Co. v. Richardson*, 6th Cir., 116 F.2d 860, 864, cert. den. 313 US 574; and *Miller v. Elgin, Joliet & Eastern Ry. Co.*, 7th Cir. 177 F.2d 224, 227 holding the doctrine applicable in FELA cases.

In the case at bar the trial court denied the requested charge on the basis of its "belief that the measureof negligence or contributory negligence is the action of a reasonable man under similar or like circumstances" (T 448-449). In other words, the trial court did not even consider the *relevance* of the requested charge with reference to the undisputed evidence that petitioner tried to board Work Extra 211, after his stop signals were ignored, in order to stop the train and prevent loss of life and limb (as well as property damage) which would occur had the train gone over the jacked-up bridge trestle at 15 or 20 miles per hour. In effect, the trial court ruled that *no* evidence would permit the jury to determine the issue of contributory negligence by a reduced standard of reasonable care in view of the real or apparent sudden emergency or peril facing the employee. It would seem clear that such ruling denies employees such as petitioner a fair trial on the issue of contributory negligence in FELA cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

By _____

IRMA ROBBINS FEDER
LAWRENCE V. HASTINGS
312 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, IRMA ROBBINS FEDER, Counsel for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on February 16, 1967, I served a true and correct copy of the foregoing Petition for Writ of Certiorari on the Respondent by mailing a copy thereof in a duly addressed envelope to DIXON, DeJARNETTE, BRADFORD, WILLIAMS, McKAY & KIMBRELL, Attorneys for Respondent, 9th Floor, Dade Federal Building, Miami, Florida 33131.

IRMA ROBBINS FEDER
312 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Attorney for Petitioner

APPENDIX

FEDERAL EMPLOYERS' LIABILITY ACT, 45 USCA:

"§51. LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE; DEFINITION OF EMPLOYEES"

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall

be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149 §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404."

* * * *

"§53. CONTRIBUTORY NEGLIGENCE; DIMINUTION OF DAMAGES"

"In all actions hereafter brought against such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: PROVIDED, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, §3, 35 Stat. 66."

[TITLE OMITTED]

(OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, CASE #65-386, FILED FEBRUARY 22, 1966)

SWANN, Judge.

This is an appeal by the plaintiff below, Joseph A. Rich, from a final judgment after a jury verdict for the defendant, Atlantic Coast Line Railroad Company.

The plaintiff has presented several points on appeal. A close review of the record indicates that they were properly resolved by the trial court and the jury. One of the points, however, deserves specific consideration.

The trial court entered a "partial directed verdict" for the defendant at the close of the evidence, and ruled that the defendant railroad was not responsible, as a matter of law, for the actions of two doctors who were allegedly negligent in the treatment of the plaintiff.

The question on appeal is were the doctors the agents of the railroad company so that the railroad would be liable for their alleged negligence; or were they independent contractors solely liable for any alleged negligence in their treatment of plaintiff? Although the testimony reveals that the plaintiff personally paid the bills submitted by each doctor, there was some degree of conflict as to whether the plaintiff was treated by the doctors in their capacity as company doctors, or as his private physicians. However, we do not find it necessary to determine this issue, as the law in this matter has

previously been determined by the Supreme Court of Florida.

In Atlantic Coast Line R. Co. v. Whitney, 1911, 62 Fla. 124, 56 So. 937, the Supreme Court of Florida was similarly confronted with the question of the liability of a railroad for the negligence of a doctor in an action by an injured employee under the Employers Liability Act. The court held that in an action against a railroad company for injury caused by the malpractice of its surgeon, the evidence must show either actual knowledge of the unfitness of the surgeon selected or retained by it, or that his general reputation was so bad that the law will impute knowledge. It was not competent to show specific acts of unskillfulness not brought home to the company. See South Florida R. Co. v. Price, 1893, 32 Fla. 46, 13 So. 638.

A thorough examination of the record fails to reveal that the company had either actual knowledge that the doctors were unfit, or that the general reputation was such as to impute knowledge. Therefore, it cannot be said, on the authority of Whitney and Price, supra, that the railroad company was liable for the action of the doctors.

The plaintiff asserts, however, that these two old cases are not present authority in view of the statement of the Supreme Court in City of Miami v. Oates, 1942, 152 Fla. 21, 10 So.2d 721, on page 724:

* * *

"* * * The rationale of those decisions [Whitney and Price] in that the physicians were

in nowise under the supervision and control of the employer, but stood in the status of independent contractors, and the duty of the employer railroad company was only to exercise due care in selecting such employees and we do not think those cases are applicable here. *Neither are we are at all certain, in the light of modern decisions, that our views expressed in those opinions would be followed in the present day.* * * *"
(Emphasis added)

* * *

These decisions, however uncertain their application might be "in light of modern decisions", remain the law to be followed by the trial court until reversed. We cannot find that the trial court erred in following the law as enunciated by the Supreme Court of Florida.

The judgment appealed is therefore

Affirmed.

[TITLE OMITTED]

(OPINION OF THE SUPREME COURT OF FLORIDA, CASE #35,375, FILED NOVEMBER 23, 1966)

PER CURIAM:

Petitioner seeks review by certiorari of that decision reported as *Joseph A. Rich v. Atlantic Coast Line Railroad Company*, Fla. App. 1966, 183 So. 2d 692. The cause was certified to us by the district court because in the opinion of that court its decision passed upon a question of great public interest "in that the decision concerns the rights of employees suing under the Federal Employer's Liability Act."

The only question discussed and decided in the subject opinion was the responsibility of a railroad for the alleged negligence of its doctors in treatment of an employee. We consider this to be the question which the district court felt to be of great public importance. The district court held that a railroad is responsible for the malpractice of its doctor only where it had either actual knowledge of his unfitness or that the doctor's general reputation was so bad that the law will impute knowledge. In reaching this conclusion the district court relied on the decisions of this court in *Atlantic Coast Line R. Co. v. Whitney*, 1911, 62 Fla. 124, 56 So. 937, and *South Florida R. Co. v. Price*, 1893, 32 Fla. 46, 13 So. 638.

As a general statement of law we think the decision of the district court is correct and it is approved and affirmed. However, we note in passing that the relationship

of a doctor to a railroad may be different under varying factual circumstances. If the relationship is not that of independent contractor, but rather of employee, then the rule announced in the district court might well not apply. In the instant case there is nothing to suggest that the doctors involved were anything other than independent contractors.

We have considered the other questions raised by the petitioner and find them to be without merit.

The decision of the district court is approved.

THORNAL, C.J., THOMAS, ROBERTS, DREW and O'CONNELL, JJ., concur

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1085

JOSEPH A. RICH,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REGINALD L. WILLIAMS
Ninth Floor, Dade Federal Building
Miami, Florida 33131

and

FRANK G. KURKA
500 Water Street
Jacksonville, Florida 32202

Attorneys for Respondent

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IN THE

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The exercise of this Honorable Court's discretionary certiorari jurisdiction in this case is opposed as there is demonstrated no special or important reason for review of the Florida Supreme Court's decision. There is involved no undetermined federal question of substance or any significant question of importance to the uniform administration of the Federal Employer's Liability Act.

QUESTIONS PRESENTED

Respondent perceives that the real points presented are:

(1) A medical doctor, listed as an approved local surgeon, is not an agent of the railroad in rendering treatment to a railroad employee on a private doctor-patient basis.

(2) Where all issues of operational negligence charged to a railroad are properly submitted to and decided by a jury, and the jury's verdict is reviewed and approved by the trial court, the state court of appeals and the state supreme court, certiorari review by this Honorable Court is not warranted.

STATEMENT OF THE CASE

Petitioner charged the railroad with a multiplicity of operationally negligent acts resulting in petitioner suffering a broken leg when he failed to mount the rear steps of the caboose of a slow-moving work train and fell to the ground. All issues concerning the alleged acts of negligence of the railroad, as well as the issue of petitioner's contributory negligence in mitigation of damages, were resolved by a jury.

A claim that petitioner prior to and at the time of his injury had suffered a work-connected dermatitis due to

railroad negligence was abandoned at the trial for lack of proof.

By an amendment to the original suit, petitioner also claimed that a Doctor Center and/or a Doctor Fox, as agents of the railroad, negligently treated him for a rash and that the railroad was consequently liable for the doctors' alleged negligence. This claim was denied by the trial court at the conclusion of the entire trial for lack of proof of agency. This ruling of the trial court was affirmed on appeal and re-affirmed by the Supreme Court of Florida on review by certiorari as a correct application of the law to the evidence in the case.

SUMMARY OF THE EVIDENCE

The operative evidentiary facts concerning the relationship of the doctors, the employee, and the railroad are simple and without material conflict.

On Monday, August 14, 1961, petitioner, who lived in St. Petersburg, Florida, was a flagman on a work train engaged in repairing a trestle 20 miles away (near Clearwater, Florida). During that day, he broke out with some kind of a rash (hives) (Tr. 134). He left the job, went to the depot at Clearwater, and was driven to a doctor by a fellow employee. He went to the office of a Doctor Center, who was among a number of doctors listed (in the back of the time table) by the railroad, but petitioner "never looked at the list," (Tr. 135). Doctor Center gave him an injection and some antihistamine pills (Benedryl and Pyrabenzamine), and he returned to work. *He paid the doctor for this professional service.* Petitioner worked the remainder of that day and the following day, Tuesday.

Because of the persistence of the rash, he marked off on Wednesday, August 16, 1961, and again sought medical attention on his own without reference to the railroad. His wife called a Doctor Fox of St. Petersburg, their family physician for many years (Tr. 119, 127). Doctor Fox was also on the list of approved local surgeons of the railroad. Doctor Fox gave petitioner ACTH and Prednisolone, and petitioner continued the antihistamine prescription given him by Doctor Center. *Petitioner paid Doctor Fox for this visit.* Petitioner marked up and worked on Thursday, August 17, 1961. He took one of the pills prescribed by Doctor Center in the morning of that day (Tr. 141), worked all day, and about quitting time (4:00 p.m.) fell and injured his leg in trying to board the train while it was moving at a slow speed (Tr. 151). Both doctors diagnosed the rash as being urticaria (hives) caused by an allergic reaction to food (tomatoes or strawberries). Neither doctor considered the treatment of the rash as a "railroad case" or in any way a work-related malady, and petitioner paid both for their medical services. The suit sought consequential damages for the injured leg, not for the rash for which Doctor Center and Doctor Fox treated petitioner.

REASONS FOR DENYING THE WRIT

Petitioner was a Private Patient of the Doctors

The first pivotal fact on the record of the case made by petitioner is that the doctors were consulted by him in a private doctor-patient relationship for treatment of a non-work related case of hives, for which petitioner paid the doctors for their services.

Railroad did not Furnish the Treatment

In apposition to the prime pivotal fact of privacy of the employment of the doctors, the record is clear that the respondent railroad "furnished" no medical treatment to petitioner for his skin rash.

Under these circumstances, these private medical practitioners could not possibly be agents or employees of the railroad. They performed no nondelegable duty of the railroad in their private medical practice, either of an operational or non-operational nature.

Proof Fatally Deficient as to Malpractice

Aside from the critical lack of agency, the proof as to the malpractice claim is fatally deficient. Assuming, *arguendo*, that the railroad had "furnished" petitioner the medical treatment by Doctors Center and Fox, there was no evidence to support a malpractice recovery. Proof of malpractice requires two evidentiary steps: the recognized standard of the medical community and a showing that the physician negligently departed from that standard. No foundation was laid as to the recognized standard and no departure therefrom was shown. *Davis v. Virginian R. Co.*, 361 U.S. 354, 358, (1960).

Medical Treatment Not an Operational Activity

It was not shown in this case that the furnishing of medical treatment to its employees was an operational activity or an operational responsibility of the respondent railroad. A railroad is held responsible for the negligence of an independent contractor or independent entity in

carrying out an "operational activity" of the railroad where such negligence results in injury to an employee, but the furnishing of medical attention by private doctors is not a part of the operations necessary to the exercise of the railroad's franchise. *Sinkler v. Missouri P. R. Co.*, 356 U.S. 326 (1958), relied upon by petitioner, involved operational negligence in connection with the movement of railway cars.

It is relevant that the *Sinkler* case, *supra*, was decided before this Court's decision in *Davis v. Virginian R. Co.*, *supra*. If the furnishing of medical treatment was an operational activity of the railroad, this Court would have so held in the *Davis* case, *supra*. It is obvious that this Honorable Court did not consider that there was any rational or legal basis to hold that the furnishing of medical treatment by a private and independent doctor formed any part of the railroad's chartered powers or operations.

As with *Sinkler*, *supra*, petitioner's reliance on *Hopson v. Texaco*, 383 U.S. 262 (1966), is misplaced. *Hopson* involved the negligence of a taxi driver hired by the defendant to carry out the *statutory duty* of the employer to transport an ill seaman to the American consulate, which duty was held to be nondelegable. No such duty is involved in the present case.

As to the responsibility of the railroad for the alleged negligence of Doctors Center and Fox, the Florida Supreme Court quite properly held that "the relationship of a doctor to a railroad may be different under varying factual circumstances. If the relationship is not that of independent contractor, but rather of employee, then the

rule announced in the district court might well not apply. In the instant case, *there is nothing to suggest that the doctors involved were anything other than independent contractors,*" (italics supplied) to which the Court might well have added, "no matter by whom they were engaged."

All Justiciable Issues Were Resolved by the Jury

Petitioner's claim for the injury to his leg was submitted to the jury on all genuine issues of fact. Petitioner's points posed as questions 2, 3, and 4 are without merit and do not warrant a digging and searching of the record of the trial by this Honorable Court. The verdict of the jury has been examined and found proper and supported by the evidence by the trial judge, the district court of appeal, and the Supreme Court of Florida.

Petitioner certainly was not entitled to a directed verdict. The court in a Federal Employer's Liability Act case cannot withdraw the issue of liability from the jury even though the proof warrants a conclusion of negligence, and this rule applies equally to the issue of employer and employee negligence. *Rogers v. Missouri P. R. Co.*, 352 U.S. 500 (1957); *Wilkerson v. McCarthy*, 336 U.S. 53, (1949). The same rule applies on appellate review. In determining whether there is evidence to support a jury verdict, the Court need only look to the evidence and reasonable inferences which tend to support the jury's verdict and on such review the Court should not substitute its view of the facts for that of the jury. *Barry v. Reading Co.*, 147 F.2d 129 (3rd Circuit), Cert. denied 324 U.S. 867, (1945).

The so-called sudden peril charge requested by petitioner did not fit the fact situation of the case at all.

The charge requested had to do with a person "placed in sudden peril not created by his own negligence" and was not predicated on petitioner trying to escape from a sudden emergency caused by the defendant's negligence. Petitioner was not in a position of peril at any time and was not trying to extricate himself from a place of personal peril. Petitioner likely confused the charge requested with the rule sometimes referred to as the "rescue" doctrine, but no such charge was sought. The "rescue" doctrine does not affect the standard of care, but merely applies the reasonable man standard to the particular circumstances. If there were circumstances under the evidence calling for a lower than ordinary standard of care on the part of petitioner, the charge of the court fully covered the situation. The jury was charged that petitioner was required to exercise for his own safety only that degree of care which a reasonable and prudent person would exercise *under the same or similar circumstances*. On appellate review in the state court, this point along with the other points raised was held to be without merit.

The petition for writ of certiorari should be denied.

Respectfully submitted,

REGINALD L. WILLIAMS
Ninth Floor, Dade Federal Building
Miami, Florida 33131

and

FRANK G. KURKA
500 Water Street
Jacksonville, Florida 32202

By Reginald L. Williams
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, REGINALD L. WILLIAMS, Counsel for Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on April 19, 1967, I served a true and correct copy of the foregoing Brief in Opposition to Writ of Certiorari on the Petitioner by mailing a copy thereof in a duly addressed envelope to IRMA ROBBINS FEDER, Attorney for Petitioner, 312 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130.

Reginald L. Williams

REGINALD L. WILLIAMS
Ninth Floor, Dade Federal Bldg.
Miami, Florida 33131

Attorney for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1085

JOSEPH A. RICH,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, a Railroad Corporation,

Respondent.

PETITIONER'S REPLY BRIEF

LAWRENCE V. HASTINGS
IRMA ROBBINS FEDER
312 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Attorneys for Petitioner

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Respondent.

PETITIONER'S REPLY BRIEF

ARGUMENT[1]

Question 1. — Negligence of Doctors as Agents of Respondent-Railroad. (See P 11-14)

Respondent's assertion that petitioner-employee consulted Dr. Center and Dr. Fox as "private" doctors relies heavily on mis-statements of the evidence.

[1] "T" symbolizes the certified transcript, "P" the Petition for Writ of Certiorari, "PA" the Appendix at the end of the Petition, and "B" respondent's Brief in Opposition to the Petition.

First, petitioner did not seek their "medical attention on his own without reference to the railroad" (B 4). Petitioner testified that after getting sick on the job and being taken to the depot **another** railroad agent there chose Dr. Center (whom petitioner had never seen before) and sent petitioner to Dr. Center in a car driven by a company employee (R 134-135). Dr. Center, respondent's Clearwater doctor (T 201), referred petitioner to Dr. Fox, respondent's St. Petersburg doctor, if further treatment was needed (T 203).

Second, it is not true that both doctors diagnosed petitioner's rash as a reaction to tomatoes or strawberries and did not consider its treatment a "railroad case" (B 4). Dr. Center never diagnosed the cause of the rash nor its status as an allergy and Dr. Center never decided whether or not it was a railroad case (T 202).

Respondent has also misconstrued the legal effect of various evidence. Neither petitioner's payment of the minimal bills to Dr. Center and Dr. Fox (and note that as Dr. Center was well aware, he thus avoided the railroad's "umpteen forms", T 205) nor Dr. Fox's legal conclusion that he saw petitioner as a private patient controls the question of "agency" for FELA purposes. Such "agency" is determined by the evidence of agency (P 5-7) and "operational activity" test (perhaps also by the "financial benefit" test) as set forth with relevant citations in the Petition (P 11-14).[2] Respondent contends that "Medical Treatment [is] Not An Operational Activity" (B 5-6) since a railroad is not required to "furnish" its employees

[2]See also *Collins v. Monongehela*, W.D. Pa. 1964, 235 F.Supp. 127, 128-129.

"medical attention by private doctors". This argument begs the question of whether Dr. Center and Dr. Fox were petitioner's purely private doctors or were respondent's agents for FELA purposes, when treating petitioner and returning him to work, by assuming the former. The fact of the matter is that respondent **did** "furnish" petitioner medical treatment for his skin rash by having him taken to Dr. Center, when he got the rash while working, and having him examined and treated by Dr. Center before being put back on the job **within a half-hour or so** (T 334). Had respondent ordered petitioner, when he got sick while working, to mark off sick and go home or seek and select medical aid "on his own", the case would be an entirely different one. But respondent sought and received (1) its doctor's examination and treatment of its employee who became ill while working and (2) its doctor's acquiescence in petitioner's return to work for the remainder of the day. Surely respondent's action in "furnishing" medical treatment to an employee who became sick while working so that he might (and did) return to work that day "was an operational activity of the railroad" and was within "the railroad's chartered powers or operations" (using respondent's own language at B 6). Surely the further treatment furnished petitioner two days later by the second railroad doctor (to whom petitioner was referred by the first one) and his advice to petitioner to return to work was similarly an occupational activity of respondent.

Respondent contends that furnishing medical treatment is **not** an operational activity of a railroad under **Sinkler v. Missouri P. R. Co.**, 356 US 326, because **Davis v. Virginian R. Co.**, 361 US 354, did not so hold and because **Hopson v. Texaco**, 383 US 262, was based entirely on the statutory duty of a shipowner to transport an ill sailor to

the U. S. Consul (B 6). The **Davis** case, **supra**, held that insufficient proof of malpractice was presented by the plaintiff and **this Court therefore determined that it "need not pass" on the issue of whether or not the railroad "would be liable for any negligence on the part of Dr. Leigh"** (361 US at 357). The **Hopson** case, **supra**, finds agency not only on account of the statutory duty involved **but also because the "seamen were in the service of the ship and the ill-fated journey to Port of Spain was a vital part of the ship's total operations"** (383 US at 264).

Respondent quotes (B 6-7) and relies on the Florida Supreme Court's holding that the Florida District Court of Appeal's rule (restricting railroad responsibility for its doctor's malpractice to cases where the railroad has actual or constructive knowledge of the doctor's unfitness) is "correct... approved and affirmed" where the doctors are independent contractors, as "[i]n the instant case", although the rule "might well not apply" if the doctors were employees (PA 6-7). Suffice to say that petitioner knows of no case in which this Court has distinguished between independent contractors and employees with reference to the "operational activity" test of agency for FELA purposes. Indeed, any such distinction would violate the "accommodating-scope" to be given "the word 'agents'" under **Sinkler v. Missouri Pacific R. Co.**, 356 US 326, 329-331 and **Hopson v. Texaco**, 383 US 262.

Lastly, respondent asserts that there is no evidence of malpractice by the doctors, because there was no showing of a relevant recognized medical community standard and departure therefrom, citing **Davis v. Virginian Railway Co.**, 361 US 354. Petitioner proved negligence in that Dr. Center and Dr. Fox treated his rash with pyrabenza-

mine, a drug often producing dizziness, drowsiness and slow thinking (see Dr. Holmes' expert testimony, T 273) **without warning petitioner or respondent of such known side effects and without telling petitioner or respondent that petitioner was therefore unfit to return to work as a railroad employee known to be working with trains and other heavy machinery.** Petitioner proved the doctor's negligence in prescribing the right medication at the wrong time and the wrong place, ie. while the doctors knew plaintiff was working with and near heavy moving machinery on the job. Under Florida malpractice law "negligence in the application or administration of an approved medical treatment" does not require expert testimony, **Atkins v. Humes**, Fla. 1959, 110 So.2d 663, 666 (and see cases cited therein). One need not be a medical expert to determine that returning a railroad employee to work while mentally confused is unreasonable or negligent under the circumstances in the case at bar. (See also **Montgomery v. Stary**, Fla. 1955, 84 So.2d 34, 40, for the rule that expert testimony is not needed with reference to causation in a case such as this). Petitioner submits that the necessity of evidence of a "recognized medical standard for the treatment of such a fracture" as was involved in **Davis v. Virginian Railway Co., supra**, does not require specific expert evidence of a "recognized medical standard" for not returning a railroad employee to work with heavy machinery while he is under the influence of a drug which impairs his mental and physical coordination.

Question 2. — Denial of Directed Verdict on Liability.
(See P 14-16)

Respondent misconceives the Petition herein by stating that the court cannot direct a verdict on liability in a

FELA case "even though the proof warrants a conclusion of negligence" and asserting that Question 2 (as well as Questions 3 and 4) "do not warrant a digging and searching of the record of the trial..." (B 7).

Petitioner contends that he was entitled to a directed verdict on liability because the evidence **conclusively established** that the railroad's negligence played some part in producing his fractured leg and permanent disability, not that the evidence merely warranted a conclusion of negligence.

Petitioner also notes that the over-4 page "Summary of Evidence" in the Petition (P 5-9) contains explicit citations to the relevant portions of the certified transcript, citations not challenged by respondent.

Question 3. — Manifest Weight of the Evidence. (See P 16)

Respondent's bare assertion (B 7) that the evidence and reasonable inferences support the jury's verdict does not in any way meet the contrary position as set forth in the Petition. Rather than repeating the material, petitioner will refer to the evidence previously summarized with citations to the certified transcript (P 5-9) and the weight to be given such evidence as previously discussed (P 15-16).

Question 4. — Denial of Charge on Sudden Peril Doctrine. (See P 16-17)

Petitioner does not understand the thrust of respondent's argument concerning this point (R 7-8).

The requested charge reads as follows:

> "In determining whether the plaintiff was guilty of contributory negligence which proximately caused his injuries, if any, I instruct you that a person placed in sudden peril not created by his own negligence is not held to the same degree of presence of mind and care which is required under ordinary circumstances. Acts done under the stimulus of sudden peril or in case of emergency requiring immediate action are not to be judged by the same standard as that applicable where the actor has ample time for reflection and intelligent choice of means."

The requested charge dealt with petitioner's actions "under the stimulus of sudden peril or in case of emergency requiring immediate action...." It would seem clear that unexpectedly having to board a moving train when one's coordination is impaired and one is mentally confused presents an instance of "sudden peril". It would seem equally clear that unexpectedly having to stop a moving train from proceeding over a jacked-up bridge with potential damage to life as well as property presents a "case of emergency".

The denial of the requested charge was not harmless error, as respondent contends (B 8), because the general contributory negligence charge referred to reasonable actions under the same or similar circumstances. Such general charge does not properly inform the jury of the reduced standard of care applicable in cases of sudden peril or emergency.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for a Writ of Certiorari, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

By_____

IRMA ROBBINS FEDER
LAWRENCE P. HASTINGS
312 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, IRMA ROBBINS FEDER, Counsel for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on April 24, 1967, I served a true and correct copy of the foregoing Petitioner's Reply Brief on the Respondent by mailing a copy thereof in a duly addressed envelope to DIXON, DeJARNETTE, BRADFORD, WILLIAMS, McKAY & KIMBRELL, Attorneys for Respondent, 9th Floor, Dade Federal Building, Miami, Florida 33131.

IRMA ROBBINS FEDER
312 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

Attorney for Petitioner